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Šimon Drugda

—Šimon Drugda, PhD Candidate at the University of Copenhagen

The chairman of the Slovak National Council (NaCo) has formally initiated the process to select replacements for nine Constitutional Court (CC) judges who will finish their term in mid-February next year.

The schedule is tight. All nominations must be made to the NaCo by January 7. Members of Parliament must then choose twice the number of candidates for each vacancy, in this case a total of 18 selections. President Andrej Kiska must then pick nine judges based on their merit and high moral character to start working on February 18th.

The President will look “only for merit and moral character” in a CC judge. [1] But should he consider diversity considerations as separate criteria for an appointment? Diversity comes in many forms. In this post, I wish to focus on one in particular: gender. There is currently a disproportionate over-representation of men on the CC in contrast to the demographics of the professional judiciary.

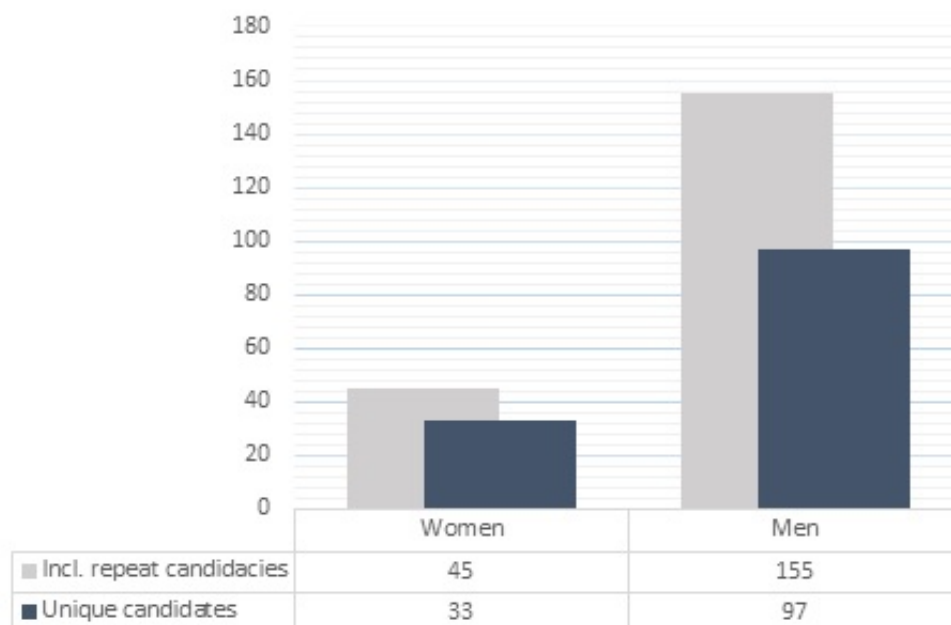
Constitutional Court and Gender

I base my analysis on a small dataset I have built after a successful Freedom of Information request to the NaCo. The Council responded only partially to my request because, as it reported to me, many historical documents from CC appointments since the establishment of the Court in 1993 have been lost. But my findings are still revealing.

Presidents have rarely paid attention to the concern for gender parity on the Court. From 1992 to 2017, 32 individuals were appointed to the Court 37 times. Only one woman has served two terms of office: judge Ľudmila Gajdošíkova (first appointed in 2000, and again in 2007). Judge Gajdošíkova was also the only woman on the 2nd generation of the CC, and one of three women of the 3rd generation, including the first female Chief Justice, Ivetta Macejková. The representation of female judges on the Court for the observed period only amounts to approximately 22%.

This result mirrors the over-representation of men on all three levels of the selection and appointment process: 1) the entry level where nominators present individual candidates for consideration; 2) the mid-level of the NaCo selection; and 3) the output level of presidential appointment. The next Figure traces all nominations made to the NaCo by gender, from 1992 to 2017.

CC candidates by gender 1992-2017



There were two hundred nominations overall in total for the CC from 1992 to 2017 (Figure 1). If we trace the data to individuals, we can observe 130 “unique candidates” some of whom ran multiple times. For all candidates including those with multiple nominations, the proportion of women is 22.5%, while for unique candidates it is approximately 25%.

These observations come in stark contrast with the demographic trends in the general judiciary. The 2016 data collected by European Commission for the Efficiency of Justice (CEPEJ) shows a clear majority of female professional judges in Slovakia at each instance including the Supreme Court: 62% female judges on courts of the first instance; 63% at the second instance; and 59% women on the Supreme Court.^[2] Female professional judges thus seem to be facing a glass ceiling in an attempt to advance specifically to the CC.

Proactive Measures to Promote Diversity on European Constitutional Courts

In light of this discrepancy, the NaCo or President might consider adopting a proactive policy to promote parity between women and men in the upcoming selection and appointment process. There are not many examples of specialised constitutional courts in Europe that attend to the concern for gender-balance in their organising statutes, but let us consider three that do.

The organising statute of the Constitutional Court of Albania, for example, in Article 7a(4), directs the appointing bodies to guarantee a balance of professional experience as well as gender equality in the selection of judges. This provision applies to the output level. It speaks to the President of Albania, the Assembly, and the High Court who get to appoint three Constitutional Court judges each. The statute on the Constitutional Court of Montenegro, on the other hand, obliges the entry level nominating bodies “to take into account the proportional representation of minorities and other minority groups, as well as

gender-balanced representation” when presenting candidates for an appointment (Article 10). These two provisions do not seem to be enforceable. Instead, they only express an aspirational principle or a value.

Finally, the organic law governing the Constitutional Court of Belgium considers the issue of gender-balance most comprehensively. Article 34(5) of the law states that each gender must be represented on the Court by at least a third of its judges. Until there is at least a third of judges of the “underrepresented sex,” a special rule applies that obliges the King to appoint a judge of that gender at least once out of every three new appointments.[3] There are currently three women on the Belgian Constitutional Court out of 12 judges, which should activate the rule soon. The organic law does apply at the output level, similar to the organising statute of the Albanian Constitutional Court, but it sets up a quota system that is also legally enforceable. King’s appointments to the Belgian Constitutional Court can be challenged in front of a judge since the appointments are made by a Royal Decree, which is an administrative act.

Conclusion

A measure tailored to the case of Slovakia in the short time there is until the appointment of judges to the Court in February could be an aspirational provision or a set of guidelines to “encourage” diversity in the selection of judges. Such “gender-balance guidelines” adopted as a simple motion in the NaCo should speak directly to the nominators at the entry level because the President and MPs can choose only from those candidates who are nominated for a vote in the NaCo.

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[1] Statement by President Andrej Kiska, on November 20, 2018, accessible at: <https://www.prezident.sk/article/prezident-nie-je-ziadna-prekazka-predlozit-osemnastich-kandidatov-na-ustavnych-sudcov/>

[2] European judicial systems Efficiency and quality of justice, CEPEJ Studies No. 26, 2018 Edition (2016 data), accessible at: <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>

[3] Article 38 of the Special Act of 4 April 2014. I would like to thank Jurgen Goossen for his comment on this point.